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Supreme Court of the United States

OCTOBER TERM, 1935.

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W. P. BROWN & SONS LUMBER COMPANY, ET AL., - - - - - - - - - - Petitioners,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. V. NORMAN,
Counsel for Petitioners.

Dated at
Louisville, Ky.,
May 29, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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W. P. BROWN & SONS LUMBER COMPANY,
ET AL., - - - - - - - - - - *Petitioners,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL., - - - - - - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Supreme Court of the United States:

Comes W. P. Brown & Sons Lumber Company, and other appellants whose names are set forth at pages one to four of the transcript of record filed herewith, and jointly and severally petition this Court to review, on writ of certiorari, a decision of the United States Circuit Court of Appeals for the Sixth Circuit, as same appears in the opinion of that Court, rendered March 6, 1936, in which decision the respondents herein, Louisville & Nashville Railroad, and other railroad companies as set forth on pages four to seven of the transcript of record filed herewith, were the successful parties adversary to these petitioners.

I.

The decision sought to be reviewed affirmed the judgment of the District Court of the United States for the Western District of Kentucky. The controversy is between shippers of lumber and carriers in respect to construction of a rule in freight tariffs, commonly known as the combination or "Jones" rule. The history of the controversy is concisely set forth in the opinion of the Circuit Court of Appeals for the Sixth Circuit, as follows (R. 124):

> "The controversy is between shippers of lumber and carriers in respect to construction of a rule in freight tariffs commonly known as the combination rule. An understanding of the point in dispute requires exposition of its historical setting.
>
> "From the principal sources of lumber supply in the south and southwest to the centers of consuming territory in the north are many rail routes served by numerous carriers. Shipments of lumber move either at through rates or at combination rates from points of origin to their destination. The through rate is what its name implies, and the combination rate is made up of the local rates of carriers contributing to the route of movement. In 1916 the President of the United States took over control of railroads. By the Federal Control Act of 1918 he was authorized to initiate rates. Increases becoming necessary, by General Order 28 of the Director General of Railroads both through rates and local rates were raised. The result was that where shipments moved over

a route for which there had been in effect a published through rate there was but one increase in that rate, but where it moved over a route served by a combination of carriers, each of whose local rates were increased but for which there was no published through rate, the shipper would pay a double and sometimes a triple increase in freight. To avoid the inequality between shippers having access to stations which published through rates and those which had not, the carriers published what is known as the combination or 'Jones' rule, which so far as applicable is as follows:

> "'Where no published through rates are in effect from point of origin to point of destination on lumber and articles taking same rates, * * * such through rate will be arrived at in the following manner, * * *.'

"Then follows the formula by which the applicable rate is determined. The purpose of the rule was concededly to insure that a shipper whose rate was made up of two or more local rates would pay but one increase in the total through rate, just as a shipper to whom was available a published through rate from the point of origin to destination would likewise pay but one increase.

"The appellants shipped lumber over routes in respect to which there was no published through rates from point of origin to destination. The carriers collected freight on the basis of the local rates in effect over such routes without adjustment by the application of the formula. The shippers complained, and then initiated a proceeding before the Interstate Commerce Commission to obtain a refund of overcharges on the ground that the combination rule was applicable to their ship-

ments. The Commission made awards of reparation on February 9, 1932, in what is known as the case of *Wausau Southern Lumber Co., et al.,* v. *Alabama Great Southern Railway, et al.,* 142 I. C. C. 521, 182 I. C. C. 731. While some of the carriers accepted the decision of the Commission, the present appellees stood their ground and in consequence the shippers filed suit in the court below under Sec. 16(2), of the Interstate Commerce Act, 49 U. S. C. A. On demurrer to the petition the District Judge sustained the contention of the carriers that the combination rule was clear and unambiguous, requiring no construction, that the award of the Interstate Commerce Commission was based upon a conclusion of law and so not binding upon the court; found as a fact that there were through rates applicable to the shipments involved, concluded that the combination rule did not therefore apply to such shipments, and dismissed the petition."

The foregoing correctly recites the history of the controversy but the statement that the purpose of the rule was "to avoid the inequality between shippers having access to stations which publish through rates and those which had not, the carriers published what is known as the combination or 'Jones' rule * * *" is a conclusion of the Court and is erroneous. Likewise the statement that the District Judge "found as a fact that there were through rates applicable to the shipments involved" is in error since the District Judge made no findings of fact. His ruling was on demurrer and he merely stated that the record showed

that there were published through rates in effect at the time of the shipments but it is admitted that these rates did not apply via the route of movement and were not the rates assessed.

The Circuit Court of Appeals for the Sixth Circuit on March 6, 1936, affirmed the judgment of the lower court (82 F. (2d) 94) (R. 123).

II.

GROUNDS RELIED ON FOR ALLOWANCE OF WRIT.

The grounds relied on for allowance of the writ are:

1. The decision herein by the Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision by the Court of Appeals of the District of Columbia on the same subject matter, in *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc., et al.*, 65 F. (2d) 488, and review of the decision herein is necessary to secure uniformity of decision.

In both cases the question at issue was the application and construction of the identical provision of the so-called combination or "Jones" rule. The Court of Appeals for the District of Columbia affirmed the decision of the Supreme Court of the District of Columbia, upholding the construction of the Interstate Commerce Commission and sustaining awards of reparation made pursuant thereto. The ruling of the Interstate Commerce Commission, thus upheld, was to the effect that the Jones rule applied where there was no joint through rate *via route of movement,* al-

though joint through rates were in effect by other routes, both tariffs carrying the combination rates having incorporated the Jones rule therein by reference.

In the case sought to be here reviewed, the Circuit Court of Appeals for the Sixth Circuit held that the rule did not apply where there were joint through rates *via any route* although there was no joint through rate via the route of movement and although both tariffs publishing the combination rates incorporated the Jones rule by reference thereto. In both cases there were through joint rates via other routes than the route of movement. The two cases therefore dealt with exactly the same subject matter and are in irreconcilable conflict.

The Circuit Court of Appeals for the Sixth Circuit discussed the decision of the Court of Appeals for the District of Columbia, rejected the reasoning and the findings thereof, and refused to follow same.

2. The question is one of general importance and relates to the construction and application of a railroad tariff provision, which, in the interest of certainty and uniformity, should be settled by this Court.

The question is not alone as to whether rates referred to in the Combination Rule shall be held to be rates by route of movement of shipment under such rule, but also whether tariff rates shall be held to be generally applicable to the route of movement or to the service performed rather than to some other route or to some other service.

Under the decision of the Court of Appeals for the District of Columbia affirming the ruling of the Interstate Commerce Commission, the rule here, and therefore tariffs generally, are held to be applicable to the route of movement, whereas under the decision of the Circuit Court of Appeals for the Sixth Circuit it is held that the rates named in the tariff are or may be rates by some other route than the route of movement.

3. The Commission's interpretation of the effect and application of the tariff provision involved administrative questions and should be sustained.

Here preliminary resort to the Interstate Commerce Commission was necessary since the question presented involved, as stated by the Court of Appeals for the District of Columbia, "more than a mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court." The Court of Appeals for the Sixth Circuit erroneously held to the contrary that no administrative question was involved and that "the question was one of law."

4. The question presented involves also the weight to be given to contemporaneous construction of railroad tariffs, which is also a question of general importance.

Here it is admitted that both shippers and carriers, for a number of years, construed the tariff as being applicable where there was no through joint rate *via route of movement*. When the carriers sought to

change the tariff by inserting the words "via any route," so as to make the plain language of the tariff restrict its application in the manner for which the carriers now contend, the Interstate Commerce Commission declined to permit such amendment (81 I. C. C. 745).

The Circuit Court of Appeals for the Sixth Circuit, in the decision here sought to be reviewed, erroneously declined to give weight to the contemporaneous construction of shippers and carriers and the Interstate Commerce Commission and held that "the practical construction of parties to a contract is not permitted to defeat the clear language of the instrument."

5. The decision sought to be reviewed results in requiring the shipper to examine tariffs other than those publishing rates covering the service desired by him and deprives him of his statutory right to route his shipments.

If a shipper desired to ship lumber from a point in the south via Cincinnati to a point in the north, he would, under the decision sought to be reviewed, in order to ascertain the rate applicable, be required to examine not only the tariffs carrying the rate for such service but other tariffs to which the initial carrier may be a party, to ascertain whether such other tariffs carried a through joint rate between the point of origin and destination via some other route. The law gives to the shipper the right to route his shipment and there may be many reasons why he desires to route it via a given point, such as Cincinnati. One of these reasons may be that he wants to stop it at Cincinnati

for drying, dressing or some other treatment which the tariffs permit. It is because of such situations that the Congress has expressly provided by Subsection 8 of Section 15, of the Interstate Commerce Act (49 Stat. L. 543), that the shipper may designate in writing the route over which he desires his property to be transported and that the carrier shall observe such routing and transport property over the route designated. The decision here sought to be reviewed erroneously deprives the shipper of that right unless the shipper be willing to pay a double increase in his rate in order to enjoy such right.

6. The decision sought to be reviewed results in closing routes heretofore open and which the Interstate Commerce Commission has expressly held to be reasonable routes.

Under the construction of the Jones Rule by the Circuit Court of Appeals for the Sixth Circuit, the rate via the routes to which the combination rates apply suffers double increases if there be a through joint rate via some other route. As a practical matter this would close these routes. The Interstate Commerce Commission, in this case, expressly held that these routes were reasonable routes and should not be closed and the Circuit Court of Appeals for the Sixth Circuit erroneously set aside said ruling.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, requiring it to certify and send to this Court a full and complete transcript

of the record and all proceedings in the case numbered and entitled on its Docket No. 6915, *W. P. Brown & Sons Lumber Company, et al., Appellants, v. Louisville & Nashville Railroad Company, et al., Defendants,* to the end that this cause may be reviewed and determined by this Court, and that the judgment herein of said Circuit Court of Appeals be reversed, and for such further relief as to this Court may seem proper.

W. P. BROWN & SONS LUMBER COMPANY,
AND OTHER PETITIONERS,
BY J. V. NORMAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS.

The opinion of the Court of Appeals for the Sixth Circuit, filed on March 6, 1936, and reported in 82 F. (2d) 94, is printed in the record at pages 124 to 128.

The opinion of the Court of Appeals for the District of Columbia, in the case of *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc., et al.,* with which the opinion here is claimed to be in conflict, is reported in 65 F. (2d) 488.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 204 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (C. 229, Sec. 1-43, Stat., 938, 28 U. S. C. A. Sec. 347 (a)).

The date of the judgment to be reviewed is March 6, 1936 (R. 123).

STATEMENT OF THE CASE.

The foregoing petition for writ of certiorari contains a concise statement of the case and, in the interest of brevity and to avoid repetition, is hereby referred to. No attempt will here be made to argue the case in chief, but this brief will be confined to a

discussion of the grounds on which the writ is sought, with a view to justifying the granting of said petition.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

We would, upon review, contend that the Court of Appeals for the Sixth Circuit erred:

1. In holding that the tariff rule in question was not applicable where there was a through joint rate between point of origin and destination *via any route.*

2. In failing to hold that the tariff rule in question was applicable unless there was a through joint rate *via route of movement.*

3. In holding that the construction and application of the tariff rule in question by the Interstate Commerce Commission involved no administrative question and was entitled to no weight.

4. In failing to give proper or any weight to the contemporaneous construction of the tariff rule in question, as made for many years by carriers and shippers and by the Interstate Commerce Commission.

5. In holding that the decision of the Court of Appeals of the District of Columbia, in *Baltimore & Ohio* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488, was unsound and in refusing to follow same.

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN ITS CONSTRUCTION OF THE TARIFF RULE IN QUESTION (SPECIFICATION OF ERRORS 1 AND 2).

The contention of the parties, as to the construction of the tariff rule in question, may best be illustrated by reading the rule with the contention of each party shown in parenthesis, as follows:

> "Where no published through rates are in ef-
> carrier shipper
> fect (via any route) (via route of shipment) from point of origin to point of destination, * * *."

The court below held that the shippers would have the Court "insert a limitation," thereby referring to the contention of the shippers that the rule should be read as applicable only to the route of shipment. The Court, however, made no reference to the contention of the carriers that there must be read into the rule the words "via any route," and this notwithstanding the fact that the carriers had attempted to amend their tariffs by inserting said words "via any route" and the Interstate Commerce Commission had declined to permit them to do so. *Cancellation Rule for Constructing Combination Rates on Lumber between Southern Points and Ohio and Mississippi Crossings,* 81 I. C. C. 745.

The Court failed to give weight to the construction and application of the tariff rule in question by the Interstate Commerce Commission although the con-

struction adopted by the Court results in closing routes which the Interstate Commerce Commission had held to be reasonable. The construction adopted by the Court also fails to give proper or any weight to the contemporaneous construction of the tariff rule in question, as made for many years by carriers and shippers as well as the Interstate Commerce Commission. The Court also erred in failing to give weight to the decision of the Court of Appeals of the District of Columbia, in *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488, and in failing to follow same.

WEIGHT TO BE GIVEN TO THE COMMISSION'S INTERPRETATION AND APPLICATION OF THE TARIFF.

This Court, in *I. C. R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, in referring to the weight which should be given to the Commission's finding, stated:

> "This Court has ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience."

In *Davis, D. G.*, v. *Prairie Pipeline Co.*, 289 F. 393, the Circuit Court of Appeals, for the 8th Circuit, said:

> "The construction of a freight tariff is a question of law, *G. N. Ry. Co., et al.*, v. *Merchants Elev. Co.*, 259 U. S. 285, 66 L. Ed. 943. The relation, however, of tariffs one to another in a common territory is not entirely a question of law,

> but more in the nature of a mixed question of law and fact. We are not bound, of course, by the finding of the Commission as to a matter of law; but it is a board with special experience and knowledge concerning these rate questions, and its decisions are helpful to the courts in arriving at correct conclusions."

We have here a question that has been passed upon by the Commission in a long line of cases, which establish a settled administrative construction. This construction must be given great weight by the Court. This principle is declared by the Supreme Court in *Logan* v. *Davis*, 233 U. S. 613, where it said:

> "The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute, by the executive department charged with its administration, is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons."

The first case in which the Commission decided this question was *Cancellation Rule for Constructing Combination Rates on Lumber between Southern Points and Ohio and Mississippi Crossings*, 81 I. C. C. 745, in which case the southern carriers attempted to change their tariffs so as to specifically provide the rule for which they now contend. The Commission said:

> "Protestants further maintain that the language of the rule in the Jones' tariff for constructing combination rates clearly indicates that such rates are invariably applicable unless there

is a joint through rate in effect over the route of movement. This, in our opinion, has been the generally accepted interpretation of the rule and much traffic has moved over these so-called unauthorized routes under this interpretation since the inception of the rule."

This ruling has been consistently followed by the Commission since that case, and the following are some of the cases considering the question:

Cancellation Rule for Combination Rates, 93 I. C. C. 614,
M'Gowin-Foshee Lumber Co. v. *A. F. & G. Ry. Co.*, 95 I. C. C. 451,
Moore Marshall Lumber Co. v. *N. O. & N. E. R. R.*, 112 I. C. C. 333,
Gunther & Co. v. *L. & N. R. R.*, 112 I. C. C. 387,
Eiler Lumber Co. v. *M. P.*, 161 I. C. C. 413,
Brabston v. *L. & N.*, 175 I. C. C. 421,
Domestic Hardwoods, Inc., v. *B. & O.*, 168 I. C. C. 753,
Milne Lumber Co. v. *N. Y. C.*, 152 I. C. C. 65,
Held v. *C. C. C. & St. L. Ry.*, 161 I. C. C. 413.

The last mentioned decision of the Commission was upheld by the Circuit Court of Appeals for the District of Columbia, in *B. & O.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488, and review was denied by this Court (290 U. S. 647).

PRELIMINARY RESORT TO THE COMMISSION IN THIS CASE WAS NOT ONLY PROPER, BUT NECESSARY.

A considerable part of the brief for the defendants, in the court below, was devoted to an argument seeking to establish that no preliminary resort to the Commission was necessary in this case. That the application to the Commission, rather than the Court, was proper, was not challenged by the defendants and, of course, cannot be since Section 9 of the Interstate Commerce Act (U. S. C. A., Title 49, Sec. 9), specifically provides that any person claiming to be damaged by any common carrier, subject to the provisions of the Interstate Commerce Act, may either make complaint to the Commission or bring suit in any District Court of the United States of competent jurisdiction.

We maintain, however, that application to the Commission in this case was not only proper, but absolutely necessary. As heretofore pointed out, there may be cases where no application to the Commission is necessary, where there is involved no question of fact or law calling for administrative functions.

But where there are administrative questions present, either of fact or of law, resort to the Commission is necessary. As to the question of fact, the decision of the Commission is final unless arbitrary or unreasonable. Where the Commission exercises *quasi*-judicial functions, its opinion is needed in an advisory

capacity and is highly persuasive unless palpably wrong.

The case here presents questions as to which the findings of the Commission were necessary on questions of fact and also in a *quasi*-judicial capacity. Chief among the questions of fact was the question whether or not the routes over which the shipment moved, or should have moved, were reasonable routes. There can be no doubt but that this is an administrative question and its determination is binding upon this Court.

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, this Court had before it the question whether preliminary resort to the Commission was necessary where there was involved the question of the reasonableness of the carriers' practice of shipping over the interstate route between two points, rather than a cheaper intrastate route between the same points. The Court held that this question was one to be determined by the Commission, and said:

> "The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

See also *Board of Railroad Commissioners* v. *Great Northern Railroad*, 281 U. S. 412.

The Commission's decision was likewise necessary in a *quasi*-judicial capacity. The construction of the tariff involved knowledge of intricate transportation matters, such as relation of tariffs one to another, knowledge of the history of the conditions under which this provision was incorporated in the tariff, and the contemporaneous construction placed thereon by the Commission, the carriers and the shippers. In such circumstances, this Court has held that initial resort to the Commission is necessary. In considering this question the Court said, in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285:

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

And in *Davis, D. G.*, v. *Prairie Pipeline Co., supra,* the Court said:

> "The construction of a freight tariff is a question of law. * * * The relation, however, of tariffs one to another in a common territory is not entirely a question of law but more in the nature of a mixed question of law and fact."

This question goes far deeper than a matter of procedure alone. It means that the Commission's advice is absolutely necessary and that its opinion should be followed, certainly on a settled question of construction of long standing.

THE COURT BELOW ERRED IN FAILING TO GIVE PROPER OR ANY WEIGHT TO THE CONTEMPORANEOUS CONSTRUCTION OF THE TARIFF RULE IN QUESTION, AS MADE FOR MANY YEARS BY CARRIERS AND SHIPPERS AND BY THE INTERSTATE COMMERCE COMMISSION.

In the amendment to the petition herein, it is alleged as follows (R. 85):

> "For several years after 1920 the railroads applied the aforesaid 'Combination Rule' to the shipments of lumber for the south or where same was not applied they made refunds on presentation of claims. In 1923 the southern roads for the first time, took the position that the rule did not apply in cases where there was a through rate by any route and undertook to amend their tariffs so as to specifically so provide, but the Interstate Commerce Commission declined to permit such amendment, 81 I. C. C. 743 and 93 I. C. C. 614."

On demurrer this allegation must, of course, be taken as true. Moreover, when the carriers undertook to amend the tariffs by inserting the words "via any route" and contended that the amendment to the tariff was merely to clarify the tariff and make certain that which the tariff already provided when properly construed, the Commission, in declining to permit the amendments, said:

> "It is the contention of respondents that under the tariffs as they now read the Jones basis for making combination rates is not available where joint through rates are in effect. They state that their purpose in publishing the suspended items was merely to clarify something that is already in the tariffs, and not to change them. *The fact that both the carriers and the shippers have in the past put a different construction on the application of this combination rule, and the further fact that the respondents now deem it necessary to call attention to this new interpretation of it, would indicate that whether so intended or not the proposed schedules are in effect a modification of the tariffs.*" *Cancellation Rule for Combination Rates*, 81 I. C. C. 745. (Italics ours.)

It will be noted that the Commission here states that "both the carriers and shippers have in the past put a different construction on the application of this Combination Rule," that is, a construction different from that for which the amended tariffs provided, which was to apply the rule to cases where there was no through joint rate *via any route*.

It therefore appears that the contemporaneous construction of all interested parties was in accord with the construction here made by the Commission, and for which we contend. It is necessary to cite only a few cases showing the weight to be given to the contemporaneous construction of documents by the parties.

As pointed out by the Court in *Union Wire Corp.* v. *A. T. & S. F. Ry. Co.*, 68 F. (2d) 965, a promulgated tariff partakes of the nature of a contract; and, as pointed out in *Updike Grain Co.* v. *C. & N. Y. Ry.*, 35 F. (2d) 486:

> "While there may be some rules of construction peculiarly applicable to a railroad tariff, yet ordinarily the rules governing the construction of other documents have been applied by the courts to such tariffs."

The universal rule as to the weight of contemporaneous construction of ambiguous documents was stated by this Court in *District of Columbia* v. *Gallaher*, 124 U. S. 505, as follows:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

And in *Michigan Home Colony* v. *Tabor*, 141 F. 332:

> "These facts, without more, show that the parties construed the covenants of their contract to be mutual and dependent. If the literal meaning of the covenants in question were in doubt, the practical construction which was put upon them by the parties must prevail."

And in *Manhattan Life Insurance Co.* v. *Wright*, 126 F. 82:

> "The practical interpretation given to the contract by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious errors."

Further citation of authorities would be superfluous.

THE COURT BELOW ERRED IN HOLDING THAT THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, IN BALTIMORE & OHIO v. DOMESTIC HARDWOODS, INC., 65 F. (2d) 488, WAS UNSOUND AND IN REFUSING TO FOLLOW SAME.

The Court below discussed the case of *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc., supra,* and gave its reasons for its conclusions that said decision was unsound and for its refusal to follow same in the following language (R. 127 and 128):

"Finally it is urged that the decision in *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488 (C. of A. D. C.), approving the construction of the Commission upon the rule before us, is conclusive of this case. Persuasive it might be, were its reasoning fully to commend itself to us. In what respect it controls our decision we are unable to understand. If upon the ground that certiorari was denied by the Supreme Court (290 U. S. 647), then the answer must be in the language of that court 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' *Atlantic Coast Line Rd.* v. *Powe*, 283 U. S. 401, 403; *United States* v. *Carver*, 260 U. S. 482, 490. The Court of Appeals of the District of Columbia in the B. & O. case sustained the Commission's construction on the ground that it was conceivable that through rates might be established over longer routes and through congested centers which would so increase costs and delay delivery as to be unavailable to shippers requiring dispatch, shipping perishable merchandise, and others. The court, however, apparently overlooked the fact that the Commission has power to require carriers to establish additional through routes whenever necessary or desirable in the public interest, and the power to fix rates over such routes under Sec. 15, paragraph (3), of the Interstate Commerce Act, and that there was in that case no question in respect to the exercise of the administrative powers of the Commission. Likewise there is none here. Even so, the court recognized that it would have had no great difficulty in accepting the carriers' view were it not

upon a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court. We perceive, however, no inherent technical question in determining whether the rule means what it says, and so find no occasion for adding to it a limitation which is nowhere implied and which no exigencies requires. We are therefore unable to follow the reasoning of the Court of Appeals of the District of Columbia to its conclusion."

It will be seen that the court below criticizes the opinion of the Court of Appeals for the District of Columbia because (a) it held that if the carriers' construction were sustained it might result in the establishment of routes that were unreasonable and were not the most direct, and (b) because it gave weight to the Commission's ruling "on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court." As to the first question, the question of routing, the Court of Appeals of the District of Columbia was undoubtedly right because the construction contended for by the carriers did result in closing routes and in leaving open only the routes by which through joint rates apply. As to these later routes, the Interstate Commerce Commission found as follows (R. 94):

> "The joint rates and routes were usually established with the intent of giving the originating carrier the long haul, and defendants do not contend that the routes over which the joint rates applied were in all instances the shortest routes, or that the routes over which combination rates, as reduced by the combination rule, are sought to be applied were unreasonable routes. We do not consider that the particular circumstances of these cases justified the use of the routes over which the higher rates were applicable."

As to the second question, the Court of Appeals of the District of Columbia, said:

> "But it should be remembered that the question involves more than the mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court. But, considered otherwise, we do not think the construction placed by the Commission on the proviso is strained, unreasonable, or unnatural."

Undoubtedly the Circuit Court of Appeals of the District of Columbia was right in the foregoing statement. The construction of the tariff rule here in question does involve the construction of railroad rates and routings. It also involves the relation of tariffs one to another, which the Circuit Court of Appeals for the Eighth Circuit, in *Davis D. G.* v. *Prairie Pipeline Co., supra,* said "is not entirely a question of law but

more in the nature of a mixed question of law and fact."

CONCLUSION.

Without attempting to further summarize or argue the points involved, we submit that they are of such importance in the construction and application of railroad tariffs that the conflict in the decisions of the Circuit Court of Appeals for the Sixth Circuit and the Court of Appeals of the District of Columbia should be settled by this Court, to the end that certainty and uniformity may be established.

WHEREFORE, it is respectfully urged that the Court grant the writ of certiorari petitioned for herein.

Respectfully submitted,

J. V. NORMAN,
Counsel for Petitioners.

Dated at
Louisville, Ky.,
May 29, 1936.